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No. 84-1660

In The
Supreme Court of the United States
October Term, 1984

MOORE,

Petitioner,

vs.

CITY OF CHARLOTTE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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OPINION BELOW

The decision of the Court of Appeals is reported at 754 F.2d 1100 (4th Cir. 1985).

STATEMENT OF THE CASE

In 1978, officials of the respondent's Police Department received information that the petitioner had accepted a bribe, in the form of money, to have a "driving while intoxicated" case dismissed. This information consisted of a statement by Eddie Drakeford, the defendant in the traffic case, that he paid money to Buddy Patterson for help in the case and a statement by Patterson that he paid the money to the petitioner for having the case dismissed. Neither Drakeford nor Patterson had been charged in connection with the alleged bribe at the time he made his statement.

When confronted by officials of the Police Department's Internal Affairs Division, the petitioner admitted that he knew both Drakeford and Patterson. The petitioner also admitted that he asked one of the arresting officers and another officer, Cureton, who had no legitimate involvement with the case, to "help" Drakeford in the traffic case, but he denied that he received any money. The petitioner made other statements that appeared, in light of other information possessed by Internal Affairs, to be false. The most damaging statement the petitioner made was that he first learned of the traffic case when he saw Drakeford in Court. Both Cureton and the arresting

officer stated that the petitioner mentioned the case to them some time prior to the court date.

Internal Affairs also learned that Cureton made misrepresentations to the prosecuting attorneys and discouraged witnesses from testifying in the traffic case. Cureton's efforts were successful in having the case dismissed prior to trial.

The petitioner, Patterson, and Cureton were indicted for bribery. Patterson and Cureton were tried first and acquitted. However, at this trial another officer testified that during the time period of the bribery investigation Cureton asked him what he would do if a supervisor asked him for help in a traffic case and indicated "there might be some money."

After his acquittal, Patterson disavowed his earlier statement implicating the petitioner in a bribe. Since Patterson was the only person who could link the petitioner with an exchange of money in connection with the dismissal of the traffic case, the criminal bribery charges against the petitioner were dismissed by the State.

Meanwhile, the police chief had cited the petitioner to the Civil Service Board for discipline, on charges of accepting a bribe and improperly interfering, for "personal advantage," in the prosecution of the traffic case. The Civil Service Board found the petitioner "not guilty" of accepting a bribe, but found that he did improperly interfere, mainly through Cureton, with the disposition of the traffic case. The Civil Service Board demoted the petitioner from sergeant to patrolman and suspended him.

As a result of allegations made during the bribery trial and during the Civil Service Hearing, Internal Af-

fairs conducted a thorough investigation of the disposition of traffic citations over a five year period. The investigation revealed that several officers, both white and black, including the petitioner in a matter unrelated to the bribery charge, had violated police department regulations by asking, and in some cases having, fellow police officers to dismiss or reduce charges against friends and relatives. The investigation did not reveal that any other officer had accepted a bribe or otherwise interfered with the prosecution of a case. No action was taken against any officer as a result of this investigation.

At the trial of the instant case, the petitioner contended that the police chief cited him to the Civil Service Board because of his race and that the Civil Service Board demoted and suspended him because of his race. To support those contentions, the petitioner produced documentary evidence that a number of white officers had not been cited to the Civil Service Board after having been found by the Police Department to have committed various offenses, and that some white officers had been cited to the Civil Service Board but had not been demoted or suspended by the Board.

The respondent submitted documentary evidence that white officers suspected of having committed infractions less serious than bribery had been cited to the Civil Service Board, that white officers had been dismissed from the Police Department by the Board, and that black officers received more lenient discipline than white officers who had committed the same types of infractions as those committed by the black officers.

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SUMMARY CF ARGUMENT

The Court of Appeals did not overturn credibility determinations of the trial judge, because the evidence consisted, in virtually its entirety, of documents of unquestioned authenticity, the contents of which either were not in dispute or were without question accurate accounts of statements made by various persons.

The Court of Appeals correctly applied the "clearly erroneous" standard of appellate review contained in Rule 52(a) of the Federal Rules of Civil Procedure.

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ARGUMENT

The evidence produced in the trial court was virtually all documentary. Both parties produced documents describing rules violations allegedly committed by police officers and the disposition of charges brought against those officers. While there was some disagreement as to the inferences to be drawn from the contents of some of those documents, neither party questioned the accuracy of those contents. The respondent put forth the information it gathered in its investigation of the bribery allegation against the petitioner. This information was all documentary, with the witness testifying only that the documents were received or made during the investigation. The petitioner denied the truthfulness of some of this information, but he did not deny that it was gathered by the respondent. Since the issue was whether the respondent had sufficient evidence to institute disciplinary proceed-

ings against the petitioner, not whether the petitioner was in fact guilty of the charges, the petitioner's protestations against the truthfulness of the evidence were immaterial and, hence, did not create any credibility issue.

Thus, there were no credibility determinations to be made by the trial court. Decision in the case required only a comparison of the allegations, findings, and punishments in all the disciplinary actions and a determination of whether that comparison would support a reasonable conclusion that the petitioner was treated more harshly than similarly situated white officers. The trial court found, in essence, that the documents showed the petitioner to have been punished more harshly by the respondent than white officers who committed violations of "comparable severity," and that the respondent had not articulated any explanation for the difference in treatment.

The Court of Appeals, after an examination of the individual discipline cases, held that the trial court's findings "rest on an unprincipled conception of 'similarity' and 'comparability,' a structural flaw that renders the fact-finding process 'clearly erroneous' under the reasoning of *Miller v. Mercy Hospital*, 720 F.2d 346, 361 (4th Cir. 1983)." (Petition, 20a.)

The Court of Appeals' decision, therefore, was not based upon a review of the trial court's credibility determinations, but upon a "principled" examination of unchallenged documentary evidence.

The reasoning of *Miller v. Mercy Hospital, supra*, is founded upon the decision in *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed.

746 (1948), where it is stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395, 68 S. Ct. at 541. The Court of Appeals found the record to be devoid of any direct or circumstantial evidence of discriminatory intent on the part of the respondent; consequently, a "definite and firm conviction" that the trial court had made a mistake was inescapable.

Anderson v. City of Bessemer City, 470 U.S. —, 106 S. Ct. —, 84 L.Ed. 2d 518 (1985), in many ways is inapposite to the instant case. A major feature of *Anderson* was the Court of Appeals' "failure to give due regard to the ability of the district court to interpret and discern the credibility of oral testimony." 84 L.Ed. at 531. Where credibility determinations are involved, "Rule 52 demands even greater deference to the trial court's findings . . ." 84 L.Ed. 2d at 529. Very pertinent to our case, however, is the statement:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. [Citations omitted.]

A conviction of the implausibility of the district court's account of the evidence is imbodied, surely, in the Court of Appeals' conclusion that the petitioner did not present even a prima facie case of discrimination. It is evident, then, that the Court of Appeals correctly applied the "clearly erroneous" standard.

The situation presented in *Hunter v. Underwood*, No. 84-76, — U.S. —, 53 L.W. 4468 (1985), is more closely analogous to the instant case. There, where the issue was whether a provision of the Alabama constitution was adopted with the intent to discriminate against black persons, the evidence consisted of records of the proceedings of the constitutional convention, historical studies, and the testimony of historians, all of which was offered and received without objection. The district court found that the constitutional provision was not adopted with racial motives, but the Court of Appeals found that discriminatory intent was a motivating factor. This court affirmed the judgment of the Court of Appeals, and in doing so approved the Court of Appeals' thorough review of the record and its application of the clearly erroneous standard of review, which " 'left [the court of appeals] with a firm and definite impression of error . . . with respect to the issue of intent.' " 53 L.W. at 4470.

The first two errors committed by the district court in the instant case were its findings of fact numbered 5 and 6 (Petition, 42a, 43a). The court, in finding that "The only evidence the police department had implicating plaintiff in a bribery conspiracy was an unsworn statement given by Buddy Patterson," and that, after Patterson recanted his statement, "defendant had no evidence that plaintiff had done anything other than to ask two officers to try to procure lenient treatment for a friend," seemingly held that the respondent, even for administrative purposes, was required to accept the petitioner's version of his actions and ignore several other facts:

1. that Patterson ever made the bribery statement;

2. the drunk driving defendant's statement that he paid Patterson to take care of the case and his mention of the petitioner as he came very close to offering a bribe to the arresting officers;

3. that the petitioner, who had no legitimate interest in the drunk driving case, requested another officer, Cureton, who also had no legitimate interest in the case, to interfere in the prosecution;

4. the petitioner's responsibility for Cureton's false statements to two district attorneys and his telling one witness not to go to court and the other witness to leave the court house;

5. the testimony of another officer that Cureton discussed a bribe with him;

6. that the petitioner and Cureton lied to Internal Affairs about their involvement in the drunk driving case.

There is no dispute that the Police Department possessed all this evidence; the district court's finding that none of it could be considered against the petitioner in administrative proceedings is a mistake. This mistake tainted the remainder of the district court's findings, because it formed the basis of that court's comparison of the petitioner's offense with offenses committed by white officers who were not cited to the Civil Service Board.

With regard to the district court's comparison of the offenses committed by various officers, it would appear that the district court, rather than reviewing the undisputed documentary evidence, relied upon the petitioner's misleading characterizations of the offenses committed by white officers. The petitioner persists in that practice

in this court. On page 16 of the petition, the petitioner describes some offenses committed by white officers. One offense is "possession of heroin" according to the petitioner; the evidence is that the officer neglected to promptly turn over heroin that had been seized from a suspect. The heroin was in the officer's file drawer at the Police Department. There was no allegation or finding that the officer criminally possessed the heroin, a conclusion that the petitioner's description might lead one to reach.

One offense is described by the petitioner as "suggesting bombing of building." The evidence, however, is that the officer said that if he had his way, he would bomb a building. The comment was made a context which caused those who heard it to consider it a joke.

The petitioner describes another offense as "compelling man to pay prostitute." When all the evidence concerning this incident is reviewed, it is clear that the officer at worst proposed that the man pay the prostitute to compensate her for injuries she received when she jumped from the man's car, this according to the statement that the man in question gave to the police. Neither the man nor the prostitute stated that they engaged together in any sex act.

The petitioner also misstates a portion of the Court of Appeals' opinion. In footnote 3, page 15, the petition states that "The Fourth Circuit itself conceded that one of those whites had violated police regulations by voiding two traffic tickets for friends and by fraudulently securing prosecutorial dismissal of one traffic case." The opinion actually says, "Hager, according to plaintiff's interpretation of the evidence, had violated police regula-

tions by voiding two traffic tickets for friends and by securing prosecutorial dismissal of one traffic case." The court went on to state, "the charge against Hager and other officers for 'fixing traffic tickets' simply paled when compared to the specter of a police sergeant conspiring to commit bribery. [There was no allegation that Hager had accepted a bribe.] The district court, in concluding otherwise, can only have reasoned that the *Moore* case was of 'comparable seriousness' to the Hager case merely because the charge against Moore included in part violations of which Hager stood accused." (Petition, 23a, 24a).

The petitioner puts forth as "critical subsidiary factual findings" the district court's findings that "white officers who committed violations similar to those committed by plaintiff not only were not prosecuted before the board, but were not disciplined at all" (Petition, 43a) and that "[a] number of white police sergeants have been found guilty by the board of violations of severity comparable to those committed by the plaintiff, but have received much milder punishment than that imposed on plaintiff." (Petition, 45a, 46a). The record reveals that the white officers who were not cited to the board committed the following offenses: being absent from work without permission; failing to follow the proper procedure for reporting out sick; directing offensive language toward citizens; the previously mentioned case in which the officer assisted the prostitute in collecting money for injuries she received; associating with the operator of a gambling house; consuming alcoholic beverages while off duty, attempting to conceal the nature of an injury to an out-of-town police officer, and going to sleep in the hos-

pital emergency room, all in one incident; operating a police vehicle after having consumed alcoholic beverages and later walking along a street in an intoxicated condition; while off duty, transporting an unauthorized person in a police vehicle; incorrectly reporting the amount of damage to a private vehicle involved in an accident; accidentally transmitting profane language over the police radio; and performing work for another employer while on police duty.

All of the officers involved were disciplined, but none was exposed to the possibility of harsher punishment before the Civil Service Board. A finding that the offenses involved are similar to accepting a bribe, the offense for which the petitioner was cited to the board, is incomprehensible and clearly erroneous, as the Court of Appeals found.

It should also be noted that black officers who committed offenses such as these were not cited to the board, either, and that white officers were cited to the board for the following offenses: altering a document posted on a police department bulletin board and making a false statement; making a false statement, filing a false report, allowing a subordinate to work another job while on duty, neglecting to turn in seized property, and disobeying a direct order, all against one officer; reporting for duty with a blood alcohol level of .07 percent; ordering that no report be made of an accident involving a police vehicle; directing offensive, indecent, and profane language to a citizen and being intoxicated while off duty; and requesting a District Attorney to have bond set for a murder suspect and helping the suspect to be released from jail to visit his parents.

Then there is the case of Hager, the white officer who was among the officers who were the subjects of the "ticket fixing" investigation, none of whom was disciplined. The investigation showed that Hager had improperly requested another officer to void speeding tickets issued to two persons who were acquainted with Hager's wife and had followed proper procedures in requesting the voiding of a traffic ticket that had been issued to a "police informant." At trial, the petitioner attempted to show that Hager gave his superior false information in the "informant" case and produced a newspaper article to that effect; but Killman, the investigating officer, testified that he did not know of the possibility of false information. Hager's offense is simply not "comparable" to accepting a bribe.

The only evidence before the district court pertaining to the Civil Service Board's discipline of white officers was as follows: A sergeant was suspended for thirty days for causing two subordinate officers to work for private employers a total of 6.5 hours while the subordinate officers were on duty; a sergeant was suspended for ten days and placed on probation for one year for reporting to work with a blood alcohol level of .07 percent; a sergeant was suspended for ten days for ordering his subordinates to delay filing a report of a police vehicle running over a dead body; a sergeant was suspended for twenty days for being intoxicated while off duty and engaging in an altercation with a motorist; two officers who committed crimes were discharged (this renders meaningless the district court's finding that "no white sergeant found guilty of a rules violation was ever demoted by the board").

The Civil Service Board found that the petitioner, "for purely personal gain," caused Cureton to take his reprehensible actions. The evidence concerning the board's disposition of charges against white officers simply does not support a finding that "white police sergeants have been found guilty by the board of violations of severity comparable to those committed by the plaintiff, but have received much milder punishment than that imposed on plaintiff."

CONCLUSION

For the reasons stated above, the court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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